

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 219 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

SUNIL KUMAR MANGALSINH KSHATRIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 219 of 1999
MR BS PATEL for Petitioner
MR UMESH TRIVEDI for Respondent No. 1
MR AS DAVE for Respondent No. 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 29/09/1999

CAV JUDGEMENT

1. The revisioner herein is accused No.6 in NDPS
Case No.8 of 1998. By this revision application, he
challenges the order of learned Additional Sessions
Judge, Vadodara, passed below Ex.21 on 10th March, 1999.
The revisioners had approached the Additional Sessions

Judge with application Ex.21 for framing a separate charge and conducting a separate trial against him relying upon Section 218 of Code of Criminal Procedure. That application came to be rejected and, hence, this revision application.

2. Facts:- Upon intelligence received by police, a raid was conducted on 12th March, 1998 at about 10.00 A.M. on the site of Rolex Pharmaceuticals Limited, at P.O. Rania, taluka Savli, district Baroda, by officers of the Narcotics Control Bureau (NCB) to find that mandrax tablets in large quantity were being manufactured over there and were being supplied. During the course of interrogation and investigation, it was revealed that six persons were involved in the said offence and, therefore, they all were arraigned. The prosecution case was that accused No.1 was the master brain working behind the project, accused Nos.2 and 3 were involved in manufacture of the tablets, No.4 was involved in putting them in circulation and accused Nos.5 and 6 were involved in supplying raw material, namely Acetic Anhydride, to the other accused persons for manufacture of the tablets. It is the case of the prosecution that accused No.6, the present revisionist had supplied quantity of acetic anhydride to accused No.5, who in turn passed the same over to accused No.1, which was used for manufacture of mandrax tablets. It has also emerged during investigation that the revisionist's involvement in supply of acetic anhydride was totally irregular, illegal and clandestine. No record was maintained. No bills, no passes, no vouchers, no invoices were issued. Acetic anhydride, a controlled substance as contemplated under Section 9-A of Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") and the Ministry of Finance, Department of Revenue has by order dated 24th March, 1993 declared the same as a controlled substance and has issued certain directions for regulation of manufacture, supply, transport, etc. and, prim facie, there has been noncompliance of this order.

3. Upon report being filed, an application came to be given by accused Nos.1, 5 and 6 for supply of copy of Forensic Science Laboratory Report to facilitate tendering of an application for discharge. On the same date, charge was framed for offences punishable under Sections 25A read with Section 9A of the NDPS Act. Therefore, accused Nos.1, 5 and 6 came with the revision application to set aside the charge by preferring Revision Application No.292 of 1999, which was heard by this Court along with this revision application and by

this revision application, accused No.6 seeks indulgence of this Court by passing an order quashing order below Ex.21 dated 10.3.1999, requesting for separate charge and trial.

4. Mr. B.S. Patel, learned advocate for the revisioner, submitted that, according to the prosecution, accused No.1 master minded the whole project. All the accused are charged for conspiracy under Section 120B of Indian Penal Code, although the prosecution case is not such. Apart from that, Mr. Patel submitted that there is nothing on record to show the meeting of mind and accused No.6-present revisioner and accused No.1. The only evidence against him is that accused No.5-Mahesh Patel had obtained certain quantity of acetic anhydride from the present revisioner and, in turn, had passed it over to accused No.1. There is nothing to indicate that accused No.6 was aware of the fact that accused No.5 is going to supply this material to accused No.1 for manufacture of mandrax tablets and, therefore, Section 120B is wrongly applied. In fact, accused No.6 could not have jointly tried with other accused persons as there is no nexus. The two transactions and the two offences are different, namely, supply of acetic anhydride by accused No.6 to accused No.5 is one offence and supply of acetic anhydride by accused No.5 to accused No.1 and manufacture of mandrax tablets therefrom is another offence. Accused No.6 had no knowledge about the same and, therefore, he cannot be connected with the main offence. Mr. Patel submitted that the entire prosecution case is broadly based on statements of other accused persons recorded by the Officers of the Narcotics Bureau under Section 67 of the NDPS Act, which are admissible in evidence. Mr. Patel submitted that, if the trial is conducted jointly, the petitioner would be prejudiced in the sense that he will have no opportunity to cross-examine his co-accused on basis of whose statements he is tried to be implicated and, therefore, separate framing of charge and separate charge was requested by the revisioner, which has wrongly been turned down by the learned Additional Sessions Judge. Mr. Patel has relied on the following decisions in support of his arguments :-

- (1) D.K. Chandra v. The State, A.I.R. 1952 Bom. 177.
- (2) Vijender v. State of Delhi, 1997(6) SCC 171.
- (3) Ram Lal Narang v. State (Delhi Admn.), A.I.R. 1979 SC 1791.
- (4) Sri Ram Varma v. The State, A.I.R. 1956 All. 466.

- (5) Suraj Pal v. State of U.P., A.I.R. 1955 SC 419.
- (6) State of Andhra Pradesh v. Ganeswara Rao, A.I.R. 1963 SC 1850.
- (7) Krishna Murthy v. Abdul Subban, A.I.R. 1965 Mysore 128.
- (8) Nga Ba Din v. Emperor, A.I.R. 1935 Rangoon 406.

Mr. Patel, therefore, urged that the petition may be allowed and the charge framed by the learned Additional Sessions Judge vide Ex.43 may be quashed and the Trial Court may be directed to frame the charge in respect of the revisioner separately and to conduct the trial separately.

5. Mr. Trivedi, learned Additional Public Prosecutor for the State has vehemently opposed the revision application. According to him, the charge is framed and the stage of recording of evidence has begun and evidence of witnesses is being recorded. He submitted that, no prejudice is going to be caused to the revisioner even if there is a joint trial. Of course, the main thrust of Mr. Trivedi's argument is that the revisioner is involved in the serious offence. He is one of the conspirators and, therefore, has to be tried jointly. Even if the offences are different, they are committed in course of the same transaction and, therefore, joint trial is permissible under Section 223(b) of the Code of Criminal Procedure. Mr. Trivedi submitted that a presumption can be drawn about the knowledge of illegal use of the material on part of the revisioner. He was aware about acetic anhydride being a controlled substance and without any permit, licence, etc., he obtained the same illegally from another person and supplied it to accused No.5, who in turn, supplied it to accused No.1 for manufacture of mandrax tablets. The very fact that he undertook this transaction in breach of law reflects mens rea. Mr. Trivedi, therefore, urged that no indulgence may be shown. Mr. Trivedi submitted that conspiracies are hatched in dark and in privacy. There cannot be any direct evidence and conspiracy has to be inferred from circumstances and conduct of parties besides the evidence that may emerge at the time of trial. At this stage, only prima facie case is to be seen without entering into the arena of evaluating the evidence in detail. Whether the material is evidentially acceptable or not is not to be seen. Mr. Trivedi has pressed into service the decision in the case of State of Maharashtra v. Som Nath Thapa, A.I.R. 1996 SC 1744 and urged that it is not even necessary for one of the conspirators to know about the indulgence in either an illegal act or legal act by illegal means and, therefore,

he urged that the revision may be dismissed.

6. Admittedly, the charge is framed and the trial has begun. Witnesses are being examined. The relief that is sought by the revisioner would call for a detailed examination of the evidence produced by the prosecution along with the charge sheet, which is not permissible in law at this stage. However, it is not impermissible to peruse the evidence to prima facie ascertain the case against the revisioner (Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja, A.I.R. 1990 SC 1962).

7. It is true that it is evident from the report of the Investigating Officer that revisioner had supplied acetic anhydride to accused No.5, who in turn passed it over to accused No.1 for manufacture of mandrax tablets. It is also true that there is no specific material to be found in the report to show that accused No.5 had disclosed to the revisioner the purpose for taking acetic anhydride while obtaining the substance from him. But then there is no material to the contrary as well to indicate that he had not disclosed the same to accused No.6. It is a chain of events which culminated into manufacture of mandrax tablets by accused No.1. The chain run thus: Accused No.1 decided to manufacture mandrax tablets. For that purpose, for obtaining one of the raw materials, namely, acetic anhydride, he approached accused No.5, who supplied some quantity of the same to accused No.1 and then for further quantity, he approached accused No.6-present revisioner and accused No.6 supplied the same to accused No.5 after obtaining it from yet another party. This transaction was totally illegal and off the record. There was no bill, no voucher, no register, no record, no invoice, etc. The entire transaction was in violation of the regulations and, that too, with knowledge. The material supplied by accused No.6, as stated above, was used for manufacture of mandrax tablets. It, therefore, prima facie, appears to be a chain or series of transactions, may be forming out of separate transactions, but at this stage, it cannot be presumed that there is no nexus amongst these transactions and the transactors. Assuming for the moment that there is no conspiracy, then also, these are transactions/offences which can be considered as having been committed in course of the same transaction and that is where section 223(d) of Code of Criminal Procedure would come into play and, therefore also, at this stage, this Court is not inclined to accept the say of the revisioner that he be tried separately, on the ground that the transaction between him and accused No.5 and the

transaction between accused No.5 and accused No.1 are two distinct and separate transactions.

7. As regards the contention that the revisioner will be prejudiced if he is tried together with other accused persons in the same trial, it may be noted that there are several charges against all the accused persons. If there is no material to indicate conspiracy, at the end of the trial, the accused would be acquitted of that charge.

8. So far as the contention that if the trial is held joint, the revisioner will be denied of his right to cross-examine the co-accused persons on whose statements under Section 67 of NDPS Act prosecution case is based, it may be noted that Section 67 of NDPS Act authorises an officer referred to in Section 42, who is authorised in this behalf by the Central Government or a State Government to call for information from any person for the purpose of satisfying himself whether there has been any contravention of this Act or Rule or order made thereunder or requires any person to produce or deliver any document or thing useful or relevant to the inquiry or examine any person acquainted with the facts and circumstances of the case. The statements recorded under Section 67 of the accused can be used against the accused. For that purpose, the prosecution will have to examine the officer concerned who has recorded the statement and who would also be available for being cross-examined to the accused persons to test the veracity of the statements. In this view of the matter, this Court is not inclined to accept the above argument. The purpose behind making this provision is to possibilise thorough and proper investigation of such cases where the offence is committed surreptitiously and schemingly. Under these circumstances, the second contention regarding prejudice also cannot be accepted and, therefore, the petition must fail.

9. As regards the decisions relied upon by Mr. B.S. Patel, it may be noted that none of the decisions directly deal with the questions raised in this petition. Attention was drawn to the decision in Sri Ram Varma v. State, AIR 1956 Allahabad 466, wherein it has been observed by the Full Bench of Allahabad High Court that the underlying idea behind rules forbidding the joinder of charges is that, if too many charges are grouped together against an accused person, he might be handicapped or embarrassed in conducting his defence and there is likelihood of the jury or the Judge being

unconsciously prejudiced against the accused when a large number of accusations are brought against him. It is also observed that once the law about the joinder of charges has been embodied in the statute, the Courts have to interpret the law as enacted and the accused's wish cannot override the law. Even if the accused agrees to the trial of particular charges in a joint trial, it does not mean that in the event of his conviction, he will be debarred from questioning the validity of the trial and conviction on the ground of misjoinder provided he can prove it.

9.1 Mr. Patel has placed reliance on the decision of Honourable Supreme Court in the case of Ram Lal Narang v. State, A.I.R. 1979 SC 1791. In that case, a joint trial was sought to be conducted for two separate conspiracies and it was held that two conspiracies were in substance and in truth separate and not one. Therefore, the investigation and taking of cognizance in second case were without jurisdiction. The object of the conspiracies were different. Under the circumstances, it was held that the second case of conspiracy was founded on separate facts from the first one whereas, in the instant case, as discussed above, there is a single chain of transactions and, therefore, the decision will not help the petitioner.

10.2 In State of Andhra Pradesh v. Ganeswara Rao, the Honourable Apex Court held as under :-

"Where an objection to misjoinder of charges contrary to the provisions of the Code is taken at any early stage of the trial there is time enough to rectify the error. But where such objection is raised for the first time only in the High Court, what the Court has to consider is whether prejudice has in fact been caused to the accused by reason of the multiplicity of charges or misjoinder, if any, of the charges. Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless, it, in fact, came to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice."

In the same decision, term "same transaction" is also

explained. It is held therein that "same transaction" would mean transaction consisting either of a single act or a series of connected acts and this expression ought to be given the same meaning according to the normal rule of construction of statutes. As discussed above, the transaction is found to be the same prima facie and, therefore, this decision will not help the petitioner. The petitioner failed to show that these two transactions are different. Merely because contraband has passed from accused No.6 to accused No.1 through accused No.5, it cannot be said that the transactions are different.

9.3 In *Vijender v. State of Delhi*, (1997) 6 SCC 171, joint trial for offences of kidnapping and murder under the Penal Code along with offence under Section 25 of Arms Act read with Section 5 of TADA for illegal possession of country-made pistol and a cartridge was not proved. In that case, there was no charge that the accused had used pistol for committing offence of kidnapping or murder and, therefore, it was held that joint trial was illegal and caused prejudice to the accused. Here the offence is committed by a single series of transactions connected with each other and, therefore, this decision also cannot be applied to the facts of the present case.

9.4 The case of *Suraj Pal v. State of U.P.*, A.I.R. 1995 (Sup.) SC 419 was a decision that was rendered after the trial. In that case, there was lack of direct and individual charges against the accused for the specific offences under Sections 307 and 302 of Indian Penal Code and absence of specific charge against the accused for the two offence was held to be a very serious lacking. This decision also, therefore, does not apply to the facts of the present case.

10. Mr. Trivedi has placed reliance on the decision of the Apex Court in *State of Maharashtra v. Som Nath Thapa*, 1996(2) Crimes 64 (SC), wherein it was held that the prosecution has not to establish that a particular unlawful use was intended so long as the goods or service in question could not be put to any lawful use. In the instant case, the entire transaction between accused No. 6 and 5 and 5 and 1 was unlawful. The material in question was contraband and was declared to be controlled substance. The entire transaction was clandestine and without any record though required by law. Further, it was held in the said decision that to bring home the charge of conspiracy, it would not be necessary for the prosecution to establish that each of the conspirators had knowledge of what the collaborator would do so long

as it is known that the collaborator would put the goods or service to an unlawful use. This would be a matter of evidence and its interpretation and evaluation and, therefore, at this stage, the relief sought by the accused cannot be granted.

11. It would also be a relevant factor and this Court cannot overlook the fact that accused Nos.1, 5 and 6 have jointly preferred Criminal Revision Application No.292 of 1999 through some advocate. This aspect cannot conclusively indicate that accused No.6 is a stranger to accused No.1 nor can it be said at this stage that accused No.6 has no nexus with accused No.1 or his activity of manufacturing of mandrax with the help of acetic anhydride obtained from accused No.6, may be through accused No.5. This aspect needs to be examined and decided on evidential merit. There is no error, therefore, in holding of a joint trial. No prejudice is likely to be caused thereby.

12. In this view of the matter, the revisioner is not able to make out a case for separating the charges and trial of accused Nos.1 to 5 on one hand and of accused No.6 on the other in NDPS Case No.8/98, pending before Additional Sessions Judge, Vadodara, the relief which he has sought in the revision application. The revision application, therefore, must fail and the same is, therefore, rejected. Rule is discharged.

[A.L. DAVE, J.]

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